

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

AZURITY PHARMACEUTICALS, INC.,

Plaintiff,

v.

BIONPHARMA INC.

Defendant.

C.A. No. 21-1286-LPS

MOTION FOR EXTENSION OF TIME

Defendant Bionpharma Inc. (“Bionpharma”) respectfully moves the Court to extend the time for the parties to submit a proposed scheduling until two weeks after this Court resolves Bionpharma’s pending Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (D.I. 97). Good cause exists to grant Bionpharma’s request for the reasons set forth below. Counsel for Bionpharma and Counsel for Plaintiff Azurity Pharmaceuticals, Inc. (“Azurity”) conferred pursuant to D. Del. LR 7.1.1, but could not reach agreement on the matters set forth herein.

Procedural History and Factual Background

Azurity initially filed this action in the District of New Jersey on June 22, 2021. Bionpharma moved to dismiss the complaint (D.I. 8) and Azurity sought an order to show cause for a temporary restraining order, preliminary injunction, and other emergent relief. (D.I. 24). Bionpharma also moved to transfer the case to this district and the New Jersey court granted that motion. (D.I. 57). After transfer to this Court, Azurity sought leave to file an amended and supplemental complaint. (D.I. 73). This Court heard oral argument on all pending motions on November 10, 2021. Following oral argument, the Court entered two oral orders. The first order resolved the pending motions. Specifically, the Court granted Azurity leave to amend the complaint and denied the motion to dismiss and the motion to show cause. (D.I. 87). The

second order required the parties to submit a proposed scheduling order by November 23, 2021 (D.I. 88). It is unclear whether the Court was aware that November 23, 2021 was prior to the due date for Bionpharma's response to Azurity's Amended Complaint. Pursuant to stipulation, the Court extended the deadline for the parties to submit a proposed schedule until December 7, 2021 (D.I. 95).

On November 11, 2021, Azurity filed its Amended and Supplemental Complaint ("First Amended Complaint") (D.I. 89), making the response to the First Amended Complaint due on November 29, 2021, which was the Monday following the Thanksgiving holiday. Bionpharma requested and Azurity agreed to a two week extension of time to respond to the First Amended Complaint (D.I. 94), which this Court approved on November 22, 2021. Bionpharma's response to the Amended Complaint was therefore due on December 6, 2021 (D.I. 94). On December 6, 2021, Bionpharma filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), *inter alia*, the First Amended Complaint ("Bionpharma's Second Motion to Dismiss").¹ See D.I. 97.

Argument

Good cause exists to grant Bionpharma's request, as intervening circumstances have changed this case; namely, Azurity's filing of duplicative actions against Bionpharma's contract manufacturer, CoreRx Inc., and subsequent voluntary dismissal of those actions, which has given rise to a new claim preclusion defense for Bionpharma that is the subject of Bionpharma's pending Second Motion to Dismiss. See D.I. 97, Bionpharma's Second Motion to Dismiss Br. at

¹ As explained in Bionpharma's Brief in Support of its Second Motion to Dismiss (D.I. 98), although Bionpharma previously filed a motion to dismiss the Complaint filed in the 21-1286 action pursuant to Fed. R. Civ. P. 12(b)(6), *see* 21-1286 D.I. 8 ("Bionpharma's First Motion to Dismiss" or "Bionpharma's First MTD"), Bionpharma's successive Second Motion to Dismiss is permitted because the grounds for that Motion were not available to Bionpharma when it filed its First Motion to Dismiss. *See* FED. R. CIV. P. 12(g)(2); *see also* D.I. 98, Bionpharma's Second Motion to Dismiss Br. at 1 n.1.

4-5. Thus, depending on the outcome of Bionpharma's Second Motion to Dismiss, this case may not go forward. Moreover, if the case ultimately goes forward, Bionpharma has not even yet answered the First Amended Complaint. Bionpharma respectfully submits that the parties should know the scope of the case while negotiating the scope of the scheduling order, which sets various limits for discovery. The requested additional time will not prejudice either party as it will provide the advantage of allowing the pleadings to close before the parties must submit a proposed scheduling order. For the foregoing reasons, Bionpharma respectfully submits that good cause exists and requests that the Court order the parties to submit a proposed scheduling order two weeks after the Court resolves Bionpharma's pending Second Motion to Dismiss. A proposed order is submitted herewith.

Dated: December 7, 2021

Respectfully submitted,

/s/ John C. Phillips, Jr.

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